

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

March 18, 2009

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**Re: *State of Delaware v. Anthony Latzgo*
Case No.: 0704020161; Assault 3rd Degree; Conspiracy 3rd Degree
Defendant's Motion for Dismissal under *CCP Cr. R. 48(b)*;
Discovery**

Letter Memorandum

Dear Counsel,

On February 27, 2009 the Office of the Public Defender filed a Motion to Dismiss (the "Motion") the instant criminal charges pursuant to Court of Common Pleas Criminal Rule 48(b). A Letter Memorandum was filed on the same date. On or about March 9, 2009 the Department of Justice, Criminal Division filed a written response to that Motion. Briefing has now been completed and the matter is ready for a written decision by the Court.

The Facts

Anthony Latzgo (the "defendant") was charged by Information two Misdemeanor Counts; one Count Assault 3rd Degree in violation of 11 *Del.C.* §611;

and one Count Conspiracy 3rd Degree in violation of 11 *Del. C.* §511 filed with the Clerk of the Court by the Attorney General. The charging documents allege that the defendant, on or about March 22, 2007 in the County of New Castle, in the State of Delaware did intentionally recklessly cause physical injury to Christopher Ruohonen “by punching him causing a laceration”. Count II, the Conspiracy 3rd Degree Count alleges, *inter alia*, that the defendant agreed with Jeffrey Strengari to engage in conduct constituting said misdemeanor and “did commit an overt act in pursuance of said conspiracy by committing said misdemeanor as set forth in Count I of the Information...”. The Officer of the Public Defender previously filed a Motion to Compel Discovery pursuant to Court of Common Pleas Criminal Rule 16.

After a hearing held on October 7, 2008 the Court granted the Motion and ordered that the State produce a video and the tape interviews on or before November 20, 2008.

The original charges were set forth and heard on an arraignment calendar on August 17, 2007. A non-jury trial was scheduled for April 2, 2008 wherein the State was granted a continuance and the matter was now set for trial on February 26, 2009.

(i.) Basis for Public Defender’s Motion

The defendant seeks a Rule 48(b) Order dismissing the case and asserts as follows in his Memorandum of Law. The case concerns an incident that occurred on March 22, 2007. The Attorney General was granted a previous continuance on the date scheduled for the instant trial, February 26, 2009. The Public Defender claims in

its Motion that the defendant and the State's witness appeared at trial on February 26, 2009 at 9:00 a.m. and the defendant's counsel informed the Attorney General that it did not anticipate the matter would be resolved by plea, although according to the Public Defender the State Prosecutor began writing the plea offer on a Plea Agreement Form. According to the Public Defender, defense counsel reiterated that no such plea would be resolved and informed the State that it would proceed to trial unless the Attorney General entered a *nolle prosequi* in the matter.¹

The Public Defender therefore asserts in his memorandum that any delay that prevented this trial from occurring should be attributed solely to the State. The defendant cites *State v. Kozak*, 1999 WL 1846459, at *2 (Del. Super., Dec. 30, 1999) for the proposition that a Rule 48(b) Motion should be granted because the delay that prevented the trial from proceeding was solely attributed to the State.

The second basis for the Public Defender's Motion is that there were discovery violations. The Public Defender represented he entered an e-mail request to the Attorney General in order to receive certain Rule 16 Discovery, citing *Johnson v. State*, 550 A.2d 903, 910-911 (Del. 1988) (when the defense makes specific authorized discovery demands the State should make specific and accurate replies). The Public

¹ It must be noted by the Court that none of this information was provided to the Court at sidebar or a colloquy by counsel. When the Judge took the bench he advised counsel that it was too late in the morning to proceed to trial after the late notice for trial.

Defender asserts that the State agreed to provide the subject discovery but did not provide police reports in response to email requests.²

At trial, the Public Defender claims that the video tape at issue and the tapes of the defendant and co-defendant tape statements are still outstanding as pending discovery. The Public Defender seeks dismissal for these discovery violations for failure to produce the items pursuant to the Court's Order on October 7, 2009 granting the Motion to Compel pursuant to *CCP Cr.R. 16(d)(2)*.

In his legal memorandum, the Public Defender cites *DeJesus v. State*, 655 A.2d 1180, 1207 (Del. 1995) for the proposition that the State has offered no explanation for the discovery violations and that the defendant has been prejudiced. According to the Public Defender, the police report indicates that "all of the withheld materials may be exculpatory to the defense." The Public Defender argues the tape statements of Mr. Latzgo and his co-defendant are clearly exculpatory. In addition, according to the defense, the statements of the alleged victim and the State's witness both have exculpatory aspects; "they clearly indicate the alleged victim initiated an unprovoked verbal confrontation with the accused and later initiated a physical confrontation by coming at the accuses after the alleged victim's friend unsuccessfully attempted to restrain him." *Id.*

The Public Defender also argues that the Police Report suggests that "the video tape will show that the alleged victim's friend attempted to prevent the alleged

² The Court notes that these informal discoveries are outside the purview the Court's authority.

victim from initiating the confrontation twice before the alleged victim finally came around him and at the accused.”

Finally, with regards to the application to dismiss the charges because of the State’s discovery violations, the Public Defender asserts that “it’s not practical to permit the State a second continuance to cure” these discovery violations because the State has stood in violation of a clear order for over three (3) months and has forced the defense to file a Motion to Compel Discovery and then “treated the resulting Court Order as meaningless.” The Public Defender cites *State v. Small*, 1992 WL1140608 (Del.Supr. April 22, 1992) for the proposition that discovery violations “it is insufficient for the State to now to take the position that the solution was to suppress the undisclosed portion of the defendant’s statement.”

(ii) Attorney General’s Answering Memorandum

The Attorney General filed a written Answering Memorandum on March 9, 2009. The State asserts that Rule 48(b) Motion to Dismiss a Criminal Information on a finding of “unnecessary delay solely attributed to the lack of available trial judge and not the prosecutorial delay is improper. *State v. McElroy*, 561 A.2d 154 (Del. 1989).

The Attorney General argues that dismissal is not the appropriate sanction for discovery violations and argues, *inter alia*, citing established case law that “among the factors a Court must weigh are the reasons for the governments delay in affording the regard to discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance”

citing Duran v. State, Del. Supr., 606 A.2d 743, 745 N.3 (1992) (cited by *DeJesus v. State*, 655 A.2d 1180, 1207 (Del. 1995).

In addition, the Attorney General argues that subsequent to the February 26, 2009 trial date the State obtained and provided via hand deliver to defense counsel a copy of the video surveillance from the incident. Second, according to the State, the Newark Police Department has confirmed to this Deputy that no recordings were made of the interviews and “at this point, therefore the State has provided all outstanding discovery.” Third, the State argues that it has additionally provided copies of photos of the victim’s injuries, Miranda forms executed by the defendant and co-defendant and a medical report.³

Finally, the State argues these recordings have been provided and any prejudice the defense cites is now cured. The State also notes the distinction in the procedural posture of *State v. Small* and the instant case is that in the present case the State is requesting a continuance.

Order and Opinion

The Court denies the Defendant’s *Court of Common Pleas Rule 48(b)* Motion because the State is not at fault as the Court rescheduled the instant trial. The trial was called too late for the morning calendar and little time was left for the Court to hear the instant case before the afternoon trial calendar commenced. A continuance

³ According to the State, its understanding that the recording of the incident was delayed in part, by the fact that the Police Officer was deployed overseas with the military and that the officer subsequently left the employment of the Newark Police Department.

is therefore not necessary because the Court, *sua sponte*, ordered the matter be reset for trial.

Second, it is clear that the State has failed to produce pursuant to the clear terms of the Court's October 7, 2008 Order granting the Defendant's Motion to Compel Discovery the video and taped interviews by November 20, 2008. The defendant, however, is entitled to a standard Deberry/Lolly instruction, but not a dismissal of the instant charges based upon this record. A copy is attached hereto. Applying the case law cited above, specifically the factors in determining the sanction, dismissal is not warranted applying all factors in *Duran* and *DeJesus*. These factors have already been addressed sufficiently in the record to not justifying dismissal of the charges; only a *Deberry/Lolly* instruction.

The Motion for Dismissal pursuant to *Court of Common Pleas Criminal Rule 48(b)* and/or Discovery Violations is Denied. The matter will be rescheduled for trial within sixty (60) calendar days by the Criminal Clerk.

IT IS SO ORDERED this 18th day of March, 2009.

John K. Welch
Judge

/jb

cc: Ms. Juanette West, Scheduling Supervisor
CCP Criminal Division